A **SEE LEONG CHYE & ANOR v. UNITED OVERSEAS BANK BHD & ANOTHER APPEAL**

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
ZAINUN ALI FCJ
B AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEALS NO: 01(f)-5-03-2017 (B) & 02(f)-8-03-2017 (B)]
10 JULY 2018

C

LAND LAW: *Indefeasibility of title and interests – Deferred or immediate – Chargee bank provided financing for purchase of land secured by charge over land – Whether chargee bank subsequent purchaser in good faith for valuable consideration – Whether there was valid registrable issue document of title –*
D *Whether 'purchaser' includes anyone acquiring interest in land – Whether 'interest' includes charge – Whether charges indefeasible – National Land Code, s. 340(2)(a) & (b) & (3)*

LAND LAW: *Indefeasibility of title and interests – Charge – Chargee bank provided financing for purchase of land secured by charge over land – Whether*
E *chargee bank subsequent purchaser in good faith for valuable consideration – Whether there was valid registrable issue document of title – Whether 'purchaser' includes anyone acquiring interest in land – Whether 'interest' includes charge – Whether charges indefeasible – National Land Code, s. 340(2)(a) & (b) & (3)*

F ***LAND LAW:*** *Sale of land – Transfer – Pre-condition for transfer – Whether sufficiently pleaded – Whether implied from terms of letter of undertaking – Failure to satisfy pre-condition – Whether transfer of land could be effected – Whether redemption sum ought to be returned*

JURISDICTION: *Court of Appeal – Appeal from High Court – Powers and duties*
G *– Whether Court of Appeal has unfettered powers to hear appeals – Whether may draw inferences of fact, give any judgment and make any order which ought to have been given or made and make such further or other orders – Whether applied correct tests – Whether Court of Appeal allowed to infer implied terms into agreement – Courts of Judicature Act 1964, s. 69(1) & (4)*

H The See brothers were the joint owners of a piece of land. Heveaplast Marketing Sdn Bhd ('Heveaplast') entered into a sale and purchase agreement ('the first SPA') to purchase the land from the See Brothers. Heveaplast became the registered owner upon the signing of the first SPA on 26 December 2008 and the memorandum of transfer of the land was duly
I executed. The balance purchase price was paid through financing provided by United Overseas Bank Bhd ('UOB') to Heveaplast, secured by charges registered over the land in UOB's favour. On 22 February 2009, Heveaplast entered into a sale and purchase agreement ('the second SPA') to sell the land

to Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi'). Pursuant to the second SPA, Kum Hoi paid the deposit to Heveaplast and obtained financing from Public Bank Berhad ('PBB') to pay the balance purchase price. Kum Hoi agreed to charge the land to PBB as security for PBB's financing. On 5 June 2009, Heveaplast signed the second memorandum of transfer ('second MOT') in favour of Kum Hoi and executed a letter of undertaking to refund the monies released by PBB if the land could not be transferred to Kum Hoi. On 29 July 2009, UOB gave a redemption statement and a letter of undertaking to refund the redemption sum to PBB if the discharge of the UOB charges could not be registered for any reasons attributable to UOB ('UOB undertaking'). Upon release of the redemption sum by PBB to UOB on 21 August 2009, the title for the land and the discharge of charge forms were released to PBB. In early September 2009, the See brothers, upon discovering that the land was transferred to Heveaplast, lodged police reports and lodged a registrar's caveat on the land. The See brothers also notified PBB about the fraudulent transfer to Heveaplast. On 15 September 2009, PBB unsuccessfully presented the second MOT, discharge of charge forms and PBB's charge for registration. The See brothers subsequently filed a suit in the High Court against, among others, Heveaplast and UOB to set aside the transfer of the land to Heveaplast and the UOB charges. The High Court allowed the claims of the See Brothers holding that Heveaplast's title over the land was defeasible under s. 340(2)(a) and (b) of the National Land Code ('NLC') and consequently, the UOB charges were defeasible. UOB appealed against the decision and the Court of Appeal ('CA') allowed the appeal on the grounds that the High Court had failed to appreciate that UOB was a subsequent purchaser in good faith and for valuable consideration and hence, enjoyed the protection under the proviso to s. 340(3) of the NLC. Whereas, Kum Hoi filed a suit against (i) Heveaplast for breach of its obligation under (a) the second SPA; and (b) the Heveaplast undertaking given to PBB; and (ii) UOB for breach of the UOB undertaking given to PBB. The High Court allowed the claims by Kum Hoi. The court found that the second SPA was 'automatically terminated' due to Heveaplast's inability to transfer the land to Kum Hoi. Heveaplast was therefore obliged to return the redemption sum. It also found that UOB was obliged to refund the redemption sum since the land had been returned to the See brothers and the UOB charges had been set aside. UOB appealed to the CA. The CA held, *inter alia*, that it was 'duty bound to infer an implied term' that the UOB undertaking would not come into effect until Heveaplast was able to transfer the land to Kum Hoi.

Hence, the two appeals: (i) Civil Appeal No 01(f)-5-03-2017(b) by the See brothers against UOB; and (ii) Civil Appeal No 02(f)-8-03-2017(B) by UOB against Kum Hoi and Heveaplast. The See brothers was granted leave to appeal on the following questions: (i) whether the transaction in question must have a valid registrable issue document of title prior to invoking the provision of s. 340 of the NLC; (ii) whether an acquirer of registered charge

A or interest or title under the NLC by means of a non-existent forged title acquires an immediate indefeasibility of title or interest; (iii) whether an acquirer of registered charge or interest registered by means of a non-existent forged title be regarded as an immediate purchaser or a subsequent purchaser since the acquirer of the interest was merely a conduit for the purchase; and
B (iv) whether a person, who has not acquired any title or interest as a result of the non-existent forged title, could convey or pass any title or interest to another. Leave to appeal was granted to UOB on the following questions of law: (i) whether the CA, when hearing an appeal, was, under s. 69 of the Courts of Judicature Act 1964 ('CJA'), duty-bound to infer the existence of
C an implied term in a contractual dispute when the issue was neither pleaded nor raised in the High Court; (ii) if question (i) was answered in the affirmative, then, under what circumstances was the CA duty-bound to make the said inference; (iii) whether the principle in *Manks v. Whiteley* would overcome privity of contract and thereby entitling a third party financier to enforce an undertaking given by a chargee bank to a third party financier to
D refund the redemption sum if the charge could not be discharged; and (iv) if question (iii) was answered in the affirmative, then what were the remedies that the third party finance was entitled to seek against the chargee bank when the chargee bank failed to honour the undertaking.

E **Held (dismissing both appeals with costs)**
Per Zulkefli Makinuddin PCA delivering the judgment of the court:

(1) Under the NLC, the word 'interest' includes a charge that is a registered interest affecting land. The word 'purchaser' means a person or body who, in good faith and for valuable consideration, acquires title to, or
F any interest in, land. The word 'purchaser' in the proviso to s. 340(3) is therefore not limited to the person acquiring title but includes those acquiring an interest in the land such as a lessee or chargee bank. Proviso to s. 340(3) of the NLC provides for deferred indefeasibility, and not immediate indefeasibility. (paras 22-24)

G **(2)** Heveaplast became the registered owner of the land as a result of the first MOT. The UOB charges were registered after Heveaplast was registered as the owner of the land. UOB provided financing to Heveaplast and hence, gave valuable consideration for the UOB charges. There was no suggestion UOB was involved in or knew about the fraud committed by
H Heveaplast. The Court of Appeal had applied the correct test and found UOB was a subsequent purchaser. The fact that Heveaplast's interest, as the immediate purchaser, was defeasible by the action taken by See brothers, was irrelevant as far as the case of UOB was concerned. (paras 29-31)

I **(3)** Question (i) was vague as it did not identify what was 'transaction in question'. The question also did not specify which was the 'provision of s. 340 of the NLC' that would be invoked. Question (ii), which was

premised on a 'non-existent forged title' was also vague and unclear. It was not clear which title question (ii) referred to in this case. The contention that a chargee's interest created based on a 'non-existent forged title' enjoys immediate indefeasibility was incorrect. Question (iii) was unclear as to what 'acquirer' and 'interest registered' meant. Question (iii) also presupposed the existence of a 'non-existent forged title'. Question (iii) presupposed the chargee was a 'conduit for the purchase'. However, there was no finding of fact by the High Court or Court of Appeal that UOB was a conduit for the purchase between Heveaplast and the See brothers. (paras 36-38)

(4) Question (iv) was clearly not related to the facts. The land was transferred to Heveaplast who then created the UOB charges over the land. Question (iv), which sought to examine whether 'a person who has not acquired any title or interest a result of the non-existent forged title' can 'convey or pass any title or interest to another', was erroneous. The UOB charges, executed by Heveaplast in favour of UOB, did not 'convey or pass' any title or interest. A charge created under the NLC is different from a common law mortgage. Hence, the CA had arrived at a correct decision based on the facts and on the law and there was no merit in the appeal by the See brothers. This court did not find it necessary to answer the four questions posed and therefore, the appeal was dismissed with costs. (paras 34, 39 & 40)

(5) UOB's leave question (i) was premised on a claim that the CA had overstepped its jurisdiction by inferring the existence of an implied term in a contractual dispute and the issue of an implied term was allegedly not pleaded by Kum Hoi. Section 69 of the CJA gives the CA unfettered powers on hearing of appeals. Under s. 69(1) of the CJA, the CA shall have all the powers and duties as to amendment or otherwise of the High Court, whilst under s. 69(4), the CA may draw inferences of fact, and give any judgment and make any order which ought to have been given or made and make such further or other orders as the case requires. The CA had properly inferred an implied term into the letter of undertaking based on the officious bystander and the business efficacy tests. There was no basis whatsoever for UOB to imply that the CA decided on an unpleaded point and had somehow allegedly flouted s. 69 of the CJA (paras 66, 72 & 76)

(6) All the facts from which the CA inferred the implied term into the letter of undertaking had been sufficiently pleaded. There is no requirement or necessity to plead the exact implied term which is a legal implication based on the pleaded facts and matters. The pleaded facts were sufficient to give rise to an implied term as concluded by the CA, namely that UOB's letter of undertaking to PBB would only come into effect if Heveaplast had the ability to transfer the land to Kum Hoi. As the ability

of Heveaplast to transfer the land was not satisfied, the CA rightly found that the letter of undertaking did not come into effect. The facts regarding Heveaplast being unable to transfer the land to Kum Hoi, which must result in the redemption sum being returned to Kum Hoi, was in fact pleaded and raised during the trial. As such, UOB could not claim that it was taken by surprise by the approach of the CA in inferring the implied term in the letter of undertaking regarding Heveaplast's ability to transfer the land. (paras 77, 79 & 83)

(7) The redemption money was released by PBB to UOB and the money originated from the loan account of Kum Hoi. Hence, PBB was nothing but a conduit for the payment of the redemption amount by Kum Hoi. The CA had rightly reached the conclusion after adopting the *Manks v. Whiteley* principle and, reading it with all contemporaneously executed documents together, recognised Kum Hoi as a proper party to sue UOB. (para 88)

(8) UOB had failed to dispute the monthly interest in its defence which Kum Hoi had prayed for in its statement of claim and as such, this clearly amounted to a non-pleaded issue. Therefore, it was unreasonable to raise the issue at this stage of the proceedings. In the circumstances, the CA and the High Court were clearly right in ordering UOB to pay Kum Hoi the monthly interest that Kum Hoi was paying to PBB on the redemption sum which was wrongfully withheld by UOB. (paras 89, 91 & 92)

Bahasa Malaysia *Headnotes*

See bersaudara adalah pemilik bersama sebidang tanah. Heveaplast Marketing Sdn Bhd ('Heveaplast') memasuki satu perjanjian jual beli ('PJB pertama') untuk membeli tanah tersebut daripada See bersaudara. Heveaplast menjadi pemilik berdaftar selepas menandatangani PJB pertama pada 26 Disember 2008 dan memorandum pindah milik tanah tersebut dimeterai sewajarnya. Baki harga belian dibayar melalui pembiayaan oleh United Overseas Bank Bhd ('UOB') kepada Heveaplast, yang dijamin dengan gadaian atas tanah berpihak pada UOB. Pada 22 Februari 2009, Heveaplast memasuki satu perjanjian jual beli ('PJB kedua') untuk menjual tanah tersebut kepada Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi'). Menurut PJB kedua, Kum Hoi membayar deposit kepada Heveaplast dan memperoleh pembiayaan daripada Public Bank Berhad ('PBB') untuk membayar baki harga belian. Kum Hoi bersetuju menggadai tanah tersebut kepada PBB sebagai jaminan pembiayaan oleh PBB. Pada 5 Jun 2009, Heveaplast menandatangani memorandum pindah milik kedua ('MOT kedua') berpihak pada Kum Hoi dan memeterai surat aku janji untuk mengembalikan wang yang dilepaskan PBB jika tanah tersebut tidak boleh dipindah milik kepada Kum Hoi. Pada 29 Julai 2009, UOB memberikan penyata penebusan dan surat aku janji untuk mengembalikan jumlah penebusan kepada PBB jika pelepasan gadaian UOB tidak boleh didaftarkan atas apa-apa alasan yang disebabkan oleh UOB ('aku janji UOB'). Selepas jumlah penebusan

dilepaskan oleh PBB kepada UOB pada 21 Ogos 2009, hak milik tanah dan borang-borang pelepasan gadaian diserahkan kepada PBB. Pada awal September 2009, See bersaudara, setelah mendapati bahawa tanah tersebut telah dipindah milik kepada Heveaplast, membuat laporan polis dan memasukkan kaveat pendaftar atas tanah itu. See bersaudara juga memaklumkan pada PBB mengenai pindah milik secara pemalsuan kepada Heveaplast. Pada 15 September 2009, PBB mengemukakan MOT kedua, borang pelepasan gadaian dan pendaftaran gadaian PBB tetapi tidak berjaya. See bersaudara kemudian memfailkan guaman di Mahkamah Tinggi terhadap, antara lain, Heveaplast dan UOB untuk mengetepikan pindah milik tanah kepada Heveaplast dan gadaian UOB. Mahkamah Tinggi membenarkan tuntutan-tuntutan See bersaudara dengan memutuskan bahawa hak milik Heveaplast terhadap tanah tersebut boleh disangkal bawah s. 340(2)(a) dan (b) Kanun Tanah Negara ('KTN') dan dengan itu, gadaian UOB boleh disangkal. UOB merayu terhadap keputusan tersebut dan Mahkamah Rayuan ('MR') membenarkan rayuan tersebut atas alasan-alasan bahawa Mahkamah Tinggi gagal mempertimbangkan bahawa UOB adalah pembeli terkemudian secara suci hati dan untuk balasan bernilai dan dengan itu, dilindungi bawah proviso pada s. 340(3) KTN. Kum Hoi pula memfailkan guaman terhadap (i) Heveaplast untuk pelanggaran tanggungjawabnya bawah (a) PJB kedua; dan (b) aku janji Heveaplast yang diberikan kepada PBB; dan (ii) UOB untuk pelanggaran aku janji UOB yang diberikan keapda PBB. Mahkamah Tinggi membenarkan tuntutan-tuntutan Kum Hoi. Mahkamah mendapati bahawa PJB kedua 'terbatal secara automatik' kerana Heveaplast gagal memindah milik tanah kepada Kum Hoi. Heveaplast oleh itu bertanggungjawab mengembalikan jumlah penebusan. Didapati bahawa UOB bertanggungjawab mengembalikan jumlah penebusan kerana tanah tersebut telah dikembalikan kepada See bersaudara dan gadaian UOB telah diketepikan. UOB merayu ke MR. Mahkamah Rayuan memutuskan, antara lain, bahawa MR 'berkewajipan untuk membuat kesimpulan mengenai terma tersirat' bahawa aku janji UOB tidak berkuat kuasa sehingga Heveaplast boleh memindah milik tanah kepada Kum Hoi.

Oleh itu, dua rayuan ini: (i) Rayuan Sivil No 01(f)-5-03-2017(B) oleh See bersaudara terhadap UOB; dan (ii) Rayuan Sivil No 02(f)-8-03-2017(B) oleh UOB terhadap Kum Hoi dan Heveaplast. See bersaudara diberi kebenaran merayu atas soalan-soalan berikut: (i) sama ada transaksi yang dipersoalkan mesti mempunyai dokumen hak milik sah yang boleh didaftar sebelum membangkitkan peruntukan s. 340 KTN; (ii) sama ada pemeroleh gadaian atau kepentingan atau hak milik berdaftar bawah KTN melalui hak milik palsu yang tidak wujud memperoleh hak milik atau kepentingan tak boleh sangkal segera; (iii) sama ada pemeroleh gadaian atau kepentingan berdaftar yang didaftarkan melalui hak milik palsu yang tidak wujud dianggap pembeli secara langsung atau pembeli terkemudian oleh sebab pemeroleh kepentingan hanya konduit untuk pembelian itu; (iv) sama ada orang yang tidak

memperoleh apa-apa hak milik atau kepentingan akibat hak milik palsu yang tidak wujud, boleh menyampaikan atau menyalurkan apa-apa hak milik atau kepentingan kepada yang lain. Kebenaran merayu dibenarkan kepada UOB atas soalan-soalan undang-undang berikut: (i) sama ada MR, apabila membicarakan rayuan, bawah s. 69 Akta Mahkamah Kehakiman 1964 ('AMK'), terikat untuk menyimpulkan kewujudan terma tersirat dalam pertikaian kontrak apabila isu tersebut tidak dirayu mahupun diplidkan atau dibangkitkan di Mahkamah Tinggi; (ii) jika soalan (i) dijawab secara afirmatif, dengan itu, bawah hal keadaan yang bagaimana MR bertanggungjawab untuk membuat inferens tersebut; (iii) sama ada prinsip dalam kes *Manks v. Whiteley* mengatasi priviti kontrak dan dengan itu memberi hak kepada pembiaya pihak ketiga menguatkuasakan aku janji yang diberi oleh bank pemberi gadaian kepada pembiaya pihak ketiga untuk mengembalikan jumlah penebusan jika gadaian tersebut tidak boleh dilepaskan; dan (iv) jika soalan (iv) dijawab secara afirmatif, apakah remedi-remedi yang boleh dipohon oleh pembiaya pihak ketiga terhadap bank pemberi gadaian apabila bank pemberi gadaian gagal menghormati aku janji tersebut.

Diputuskan (menolak rayuan-rayuan dengan kos)

Oleh Zulkefli Makinuddin PMR menyampaikan penghakiman mahkamah:

(1) Bawah KTN, perkataan 'kepentingan' termasuk gadaian, iaitu kepentingan berdaftar atas tanah. Perkataan 'pembeli' bermaksud seseorang atau badan yang, secara suci hati dan untuk balasan bernilai, memperoleh hak milik, atau kepentingan dalam, tanah. Oleh itu, perkataan 'pembeli' dalam proviso kepada s. 340(3) tidak terhad kepada orang yang memperoleh kepentingan dalam tanah seperti pemajak atau bank pemberi gadaian. Proviso kepada s. 340(3) KTN memperuntukkan untuk ketakbolehsangkalan tertunda dan bukan ketakbolehsangkalan serta-merta.

(2) Heveaplast menjadi pemilik berdaftar tanah disebabkan oleh MOT pertama. Gadaian UOB didaftarkan selepas Heveaplast didaftarkan sebagai pemilik tanah. UOB memberikan pembiayaan kepada Heveaplast dan dengan itu, memberi balasan bernilai untuk gadaian UOB. Tidak dicadangkan bahawa UOB terlibat dalam atau mengetahui tentang pemalsuan yang dilakukan oleh Heveaplast. Mahkamah Rayuan mengguna pakai ujian yang betul dan mendapati UOB ialah pembeli terkemudian. Fakta bahawa kepentingan Heveaplast, sebagai pembeli terus, boleh disangkal oleh tindakan yang diambil See bersaudara, tidak relevan setakat yang berkaitan kes UOB.

(3) Soalan (i) kabur kerana tidak mengenal pasti apakah 'transaksi yang dipersoalkan'. Soalan itu juga tidak menyatakan dengan khusus 'peruntukan s. 340 KTN' mana yang akan dibangkitkan. Soalan (ii), yang berasaskan 'hak milik palsu yang tidak wujud' juga kabur dan tidak

jelas. Tidak jelas hak milik mana yang dirujuk dalam soalan (ii) dalam kes ini. Hujahan bahawa kepentingan pemberi gadaian yang dibentuk berasaskan 'hak milik palsu yang tidak wujud' mempunyai ketakbolehsangkalan segera, tidak benar. Soalan (iii) tidak jelas tentang apa yang dimaksudkan dengan 'pemeroleh' dan 'kepentingan berdaftar'. Soalan (iii) juga mengandaikan kewujudan 'hak milik palsu yang tidak wujud'. Soalan (iii) mengandaikan pemberi gadaian adalah 'konduit untuk pembelian'. Walau bagaimanapun, tiada dapatan fakta oleh Mahkamah Tinggi atau Mahkamah Rayuan bahawa UOB adalah konduit untuk pembelian antara Heveaplast dan See bersaudara.

(4) Soalan (iv) jelas tidak berkait dengan fakta. Tanah tersebut dipindah milik kepada Heveaplast yang kemudiannya membentuk gadaian UOB atas tanah itu. Soalan (iv) yang cuba menilai sama ada 'seseorang yang tidak memperoleh apa-apa hak milik atau kepentingan kerana hak milik palsu yang tidak wujud' boleh 'menyampaikan atau menyalurkan apa-apa hak milik atau kepentingan kepada yang lain', adalah salah. Gadaian UOB, dimeterai oleh Heveaplast berpihak pada UOB, tidak 'menyampaikan atau menyalurkan' apa-apa hak milik atau kepentingan. Gadaian yang dibentuk bawah KTN berbeza daripada gadai janji common law. Oleh itu, MR mencapai keputusan yang betul berdasarkan fakta-fakta dan undang-undang dan tiada merit dalam rayuan oleh See bersaudara. Mahkamah ini mendapati tidak perlu menjawab keempat-empat soalan yang dikemukakan dan dengan itu, rayuan ditolak dengan kos.

(5) Soalan kebenaran (i) UOB berasaskan tuntutan bahawa MR melampaui bidang kuasanya dengan mengandaikan kewujudan terma tersirat dalam pertikaian kontrak dan isu terma tersirat didakwa tidak diplidkan oleh Kum Hoi. Seksyen 69 AMK memberikan MR kuasa yang tidak terhad untuk mendengar rayuan. Bawah s. 69(1) AMK, MR mempunyai kesemua kuasa dan tanggungjawab untuk pindaan atau sebaliknya terhadap Mahkamah Tinggi, manakala bawah s. 69(4), MR boleh membuat anggapan fakta, dan memberikan apa-apa penghakiman dan membuat apa-apa perintah yang perlu diberi atau dibuat dan membuat apa-apa perintah lanjut atau lain seperti yang perlu untuk kes tersebut. Mahkamah Rayuan membuat inferens wajar terma tersirat untuk surat aku janji berdasarkan ujian 'officious bystander and business efficacy'. Tiada apa-apa asas untuk UOB mengandaikan MR membuat keputusan berdasarkan isu yang tidak diplid dan dikatakan melanggar s. 69 AMK.

(6) Kesemua fakta daripada mana MR mengandaikan terma tersirat pada surat aku janji telah diplid sewajarnya. Tiada keperluan untuk memplid terma tersirat yang tepat yang merupakan implikasi undang-undang berdasarkan fakta-fakta dan perkara-perkara yang diplid. Fakta-fakta yang diplid mencukupi untuk membangkitkan terma tersirat seperti yang diputuskan MR, iaitu, bahawa surat aku janji UOB kepada PBB hanya

akan berkuat kuasa jika Heveaplast boleh memindah milik tanah kepada Kum Hoi. Oleh sebab Heveaplast tidak memenuhi kebolehan memindah milik, MR dengan betul mendapati surat aku janji tidak berkuat kuasa. Fakta-fakta mengenai Heveaplast tidak boleh memindah milik tanah kepada Kum Hoi, yang mengakibatkan jumlah penebusan dikembalikan kepada Kum Hoi, sebenarnya telah diplid dan dibangkitkan semasa perbicaraan. Oleh itu, UOB tidak boleh menyatakan terkejut dengan pendekatan MR dalam mengandaikan terma tersirat dalam surat aku janji mengenai kebolehan Heveaplast untuk memindah milik tanah.

(7) Wang penebusan dilepaskan oleh PBB kepada UOB dan wang itu adalah dari akaun pinjaman Kum Hoi. Oleh itu, PBB hanya konduit untuk bayaran jumlah penebusan oleh Kum Hoi. Mahkamah Rayuan telah mencapai keputusan yang betul selepas menggunakan prinsip dalam kes *Manks v. Whiteley* dan, membacanya bersama-sama dengan kesemua dokumen yang dimeterai, mengakui Kum Hoi sebagai pihak yang betul untuk menyaman UOB.

(8) UOB gagal mempertikaikan faedah bulanan dalam pembelaannya yang dipohon Kum Hoi dalam penyata tuntutannya dan dengan itu, jelas membentuk isu yang tidak diplid. Oleh itu, tidak wajar untuk membangkitkan isu itu di peringkat prosiding ini. Dalam keadaan tersebut, MR dan Mahkamah Tinggi jelas betul dalam memerintahkan UOB membayar Kum Hoi, faedah bulanan yang dibayar Kum Hoi kepada PBB atas jumlah penebusan yang dipegang secara salah oleh UOB.

Case(s) referred to:

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

BP Refinery (Westernport) Pty Ltd v. President, Councillors And Ratepayers of the Shire of Hastings (1977) 16 ALR 363 ***(refd)***

CIMB Bank Bhd v. AmBank & Ors [2017] 9 CLJ 145 FC ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***

In re An Arbitration Between Comptoir Commercial Anversois and Power, Son And Company (1920) 1 KB 868 ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener) [2014] 3 CLJ 869 HC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal [2017] 3 CLJ 257 FC

Manks v. Whiteley (1912) CA 785 ***(refd)***

MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 CA ***(refd)***

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 4 CLJ 345 FC ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 3 CLJ 481 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
The Moorcock (1889) 14 PD 64 ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(1), (4)
National Land Code, ss. 5, 92, 98, 241(1), 242(1), 243, 340(2)(a), (b), (c), (3)

(Civil Appeal No. 01(f)-5-03-2017 (B))
For the appellants - Andrew Chiew Ean Vooi & Arthur Ng Wei Meng; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - S Selvarajah, Rewathy Krishnan Kutty, Sharuni Tarmaraja & James Lopez; M/s Rastam Singa & Co

(Civil Appeal No: 02(f)-8-03-2017 (B))
For the appellant - S Selvarajah, Rewathy Krishnan Kutty, Sharuni Tarmaraja & James Lopez; M/s Rastam Singa & Co
For the respondents - Andrew Chiew Ean Vooi & Arthur Ng Wei Meng; M/s Lee Hishammuddin Allen & Gledhill

Jabatan Insolvensi Malaysia - Norina Zainol Abidin; SFC

[Editor's note: For the Court of Appeal judgment, please see Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals [2017] 2 CLJ 43 (affirmed).]

Reported by S Barathi

JUDGMENT

Zulkefli Ahmad Makinudin PCA:

Introduction

[1] There are two appeals before us arising from two civil actions filed by the respective parties. The two civil actions were heard one after the other in the High Court in view of the fact that they relate to competing claims between the affected parties over the same piece of land ("the land").

[2] In the first appeal (Civil Appeal No. 01(f)-5-03-2017(B)) the appellants, See Leong Chye @ Sze Leong Chye and See Ewe Lin ("the See brothers") were the plaintiffs in the High Court Civil Suit No. 22-233-2010 ("suit 233"), while the respondents (United Overseas Bank Berhad ("UOB") and Heveaplast Marketing Sdn Bhd ("Heveaplast") were the second and first defendant respectively.

[3] In the second appeal (Civil Appeal No. 02(f)-8-03-2017(B)) the appellant, United Overseas Bank (Malaysia) Berhad ("UOB") was the second defendant and Heveaplast Marketing Sdn Bhd ("Heveaplast") was the first defendant in the High Court Civil Suit No. 22-216-2010 ("suit 216"), while the respondent, Kum Hoi Engineering Industries Sdn Bhd ("Kum Hoi") was the plaintiff.

Background Facts

[4] The relevant background facts of these two appeal cases are as follows:

> The See brothers are joint owners of the land. Heveaplast claimed to have entered into a sale and purchase agreement (first SPA) to purchase the land from the See brothers. The first SPA was signed and dated 26 December 2008. Heveaplast became the registered owner of the land with effect from 22 April 2009 and the Memorandum of Transfer of the land was duly executed ("first MOT"). The balance of the purchase price was paid on 28 April 2009 through financing provided by UOB to Heveaplast.

[5] By way of letters of offer dated 8 April 2009 and 6 August 2009, UOB offered a fixed loan to Heveaplast to part finance the purchase of the land. The fixed loan was secured by charges in UOB's favour (UOB charges). The UOB charges were registered over the land on 22 April 2009.

[6] Heveaplast then entered into a sale and purchase agreement ("second SPA") to sell the land to Kum Hoi. The second SPA was dated 12 February 2009. Pursuant to the second SPA, Kum Hoi paid RM889,555.60 to Heveaplast as deposit and obtained financing from Public Bank Berhad ("PBB") to pay the balance purchase price. Kum Hoi agreed to charge the land to PBB as security for PBB's financing. On 5 June 2009, Heveaplast signed the second memorandum of transfer ("second MOT") in favour of Kum Hoi.

[7] On 19 June 2009, Heveaplast executed a letter of undertaking to refund the monies released by PBB if the land could not be transferred to Kum Hoi. On 29 July 2009, UOB gave a redemption statement and letter of undertaking to refund the redemption sum to PBB if the discharge of the UOB charges could not be registered for any reasons attributable to UOB ("UOB undertaking"). PBB released the redemption sum of RM3,255,211.58 to UOB on 21 August 2009. Messrs Ong & Kok released the title for the land and the discharge of charge forms to PBB's solicitors on 11 September 2009.

[8] In early September 2009, the See brothers discovered that the land was transferred to Heveaplast. Police reports were lodged. Upon the See brothers' application, a Registrar's caveat was registered on the land on 14 September 2009. The See brothers also notified PBB about the fraudulent transfer to Heveaplast by way of a letter dated 14 September 2009. On 15 September 2009, PBB's solicitors unsuccessfully presented the second MOT, discharge of charge forms and PBB's Charge for registration.

[9] On 2 October 2009 and 7 October 2009, the See brothers, through their solicitors, demanded Heveaplast to re-transfer the land to them. On 5 October 2009, See brothers entered a private caveat. On 19 February 2010, The See brothers filed suit 233 against, among others, Heveaplast and UOB in order to set aside the transfer of the land to Heveaplast and the UOB charges. The High Court allowed the claims of the See brothers on 27 November 2014.

[10] On 19 February 2010 Kum Hoi filed suit 216 against:

(a) Heveaplast for breach of its obligation under:

(i) the second SPA; and

(ii) the Heveaplast undertaking given to PBB;

(b) UOB for breach of the UOB undertaking given to PBB.

On 27 November 2014, the High Court allowed the claims by Kum Hoi.

We shall first deal with the first appeal before us by the See brothers in suit 233.

Decision Of The High Court

[11] In suit 233, the High Court found:

(a) The land was transferred to Heveaplast by way of fraud and forgery of the first SPA and first MOT used to effect the transfer of the land from the See brothers to Heveaplast. Consequently, Heveaplast's title over the land was defeasible under s. 340(2)(a) and (b) of the National Land Code ("NLC").

(b) Since Heveaplast's title was defeasible, Heveaplast had no right, interest or title over the land and could not have therefore charged the land to UOB. The UOB charges were defeasible.

The High Court granted the declaration and orders sought in the amended writ and statement of claim of the See brothers. UOB appealed against the decision.

Decision Of The Court Of Appeal

[12] On 26 February 2016, the Court of Appeal unanimously allowed the appeal by UOB. In allowing UOB's appeal, the Court of Appeal held that the High Court failed to appreciate that UOB was a subsequent purchaser in good faith and for valuable consideration, and hence enjoyed the protection under the proviso to s. 340(3) of the NLC.

Leave Questions

[13] This court granted leave to appeal by the See brothers against the decision of the Court of Appeal on the following four questions:

A Question 1

Must the transaction in question have a valid registrable issue document of title prior to invoking the provision of s. 340 of the National Land Code?

B Question 2

Whether an acquirer of registered charge or interest or title under the National Land Code by means of a non-existent forged title acquires an immediate indefeasibility of title or interest?

C Question 3

Can an acquirer of registered charge or interest registered by means of a non-existent forged title be regarded as an immediate purchaser or a subsequent purchaser since the acquirer of the interest was merely a conduit for the purchase?

D Question 4

Can a person who has not acquired any title or interest as a result of the non-existent forged title, convey or pass any title or interest to another?

Decision Of This Court

E **[14]** The issue in this first appeal is whether UOB as a registered chargee is a *bona fide* purchaser for valuable consideration under the proviso to s. 340(3) of the NLC. For the See brothers it was submitted that it is an undisputed and unchallenged fact that they are the registered proprietors of the land since 1973 and Heveaplast (the purchaser) was in cohorts with the F imposters/fraudsters.

[15] Learned counsel for the See brothers impressed upon us that the vitiating facts of this case against UOB are as follows:

(i) the original issued document of title to the land was at all material times G in the possession of the See brothers;

(ii) the signatures of the See brothers were forged in the sale and purchase agreement and the memorandum of transfer;

(iii) the See brothers' identification cards were forged;

H (iv) the See brothers never received any consideration;

(v) the See brothers never signed the charge in favour of UOB; and

(vi) the memorandum of transfer and UOB's charge were registered using a forged title.

I **[16]** It was submitted for the See brothers that on the above facts, UOB never derived any interest from the See brothers (the registered proprietors) in respect of the charge. We find that the See brothers' argument for their

case is essentially based on a simplistic approach that since Heveaplast never had any rights to the land, UOB therefore never obtained any interest on the land. With respect, we could not agree to such an approach. The competing interest of the parties must be determined based on the facts of a particular case and taking into consideration the application of the provisions of s. 340 of the NLC as a whole.

[17] For UOB, it was submitted that s. 241(1) of the NLC allows a charge to be created over any alienated land to secure the repayment of any debt. Section 242(1) of the NLC provides that a charge to secure repayment of a debt shall be effected by an instrument in Form 16A.

[18] It is to be noted that every charge created under the NLC shall take effect upon registration so as to render the land in question liable as security. (See s. 243 of the NLC). A duly registered charge is indefeasible under s. 340(1) of the NLC.

[19] Under s. 340(2) of the NLC the title or interest of a chargee shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy (s. 340(2)(a) of the NLC); or

(b) where the registration was obtained by forgery, or by means of an insufficient or void instrument (s. 340(2)(b) of the NLC); or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law (s. 340(2)(c) of the NLC).

[20] A charge, which is defeasible by reason of s. 340(2) of the NLC is "liable to be set aside in the hands of any person or body to whom it may subsequently be transferred" and "any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested (s. 340(3))".

[21] It is noted that the See brothers' case is premised on s. 340(2) read with s. 340(3) of the NLC. It was contended that since Heveaplast's title was defeasible and set aside, the UOB charges subsequently granted should also be set aside. However, UOB has relied in its defence under the proviso to s. 340(3) of the NLC which states:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[22] It is to be noted that under the NLC the word "interest" includes a charge that is a registered interest affecting land. (See ss. 92 and 98 of the NLC). As regards the word "purchaser", it means a person or body who in good faith and for valuable consideration acquires title to, or any interest in, land. (See s. 5 of the NLC).

[23] We are of the view that the word "purchaser" in the proviso to s. 340(3) is therefore not limited to the person acquiring title but includes those acquiring an interest in the land such as a lessee or chargee bank. (See the case of *Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener)* [2014] 3 CLJ 869; [2014] 7 MLJ 652 and *CIMB Bank Bhd v. AmBank & Ors* [2017] 9 CLJ 145).

[24] It has been laid down in case laws that the proviso to s. 340(3) of the NLC provides for deferred indefeasibility, and not immediate indefeasibility. On this point in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, the Federal Court held:

> [21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis-a-vis* the title or interest.
>
> ...
>
> [49] The question is, does the proviso following immediately after sub-s.(3), apply to the other provisions of s. 340, in particular to sub-s. 2(b) ...
>
> [50] As we see it, sub-s. (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s. (2) shall continue to be liable to be set aside in the hand of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:
>
> > Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> [51] We are of the view that the proviso is directed towards the provision of sub-s. (3) alone and not to the earlier subsection. This in our view is supported by the use of the words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of another provision of s. 340.
>
> [52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s.(2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the Court in *Adorna Properies*, to apply to sub-s. (2)(b). By so doing the Court had clearly gone against the clear

intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s.(3) equally applies to sub-s. (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC.

[25] In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, the Federal Court set out the guide for determining when a purchaser falls under the proviso to s. 340(3) of the NLC. Jeffrey Tan FCJ, said:

(41) Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[26] In *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188, the Federal Court reiterated this:

[28] In the circumstances where the title or interest is subsequently transferred, s. 340(3) provides that the subsequent proprietor or transferee will similarly obtain (*sic*) a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to s. 340(3) confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect, s. 340 introduces what is called the concept of deferred indefeasibility (*Tan Ying Hong v. Tan Sian San & Ors*).

Tan Ying Hong and *Kamarulzaman* were also followed in two later Federal Court decisions, *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257; [2016] 5 MLJ 141 and *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1.

[27] In the latest Federal Court decision, *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, Jeffrey Tan FCJ said:

> [45] In the wake of *Tan Ying Hong, Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors*, and *Samuel Naik Siang Ting v. Public Bank Bhd*, the concept of immediate indefeasibility of the title of an immediate purchaser was passe, if not already in 2010 then certainly in January 2016. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. The Respondent was not a subsequent *bona fide* purchaser. The Respondent was an immediate purchaser who was not entitled to the protection under the proviso in section 340. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of an immediate purchaser is still liable to be set aside. (*Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors*).

[28] We are of the view that the Court of Appeal had correctly observed that the High Court seemed to have erroneously found UOB to be an immediate purchaser, and, hence, not entitled to the defence under the proviso to s. 340(3) of the NLC.

[29] We find the undisputed facts showed that Heveaplast became the registered owner of the land as a result of the first MOT. The UOB charges were presented, after presentation of the first MOT, for registration. The land search showed that the UOB charges were registered after Heveaplast was registered as the owner of the land. We also find UOB provided financing to Heveaplast and hence, gave valuable consideration for the UOB charges. There was no suggestion that UOB was involved in or knew about the fraud committed by Heveaplast.

[30] We noted that the Court of Appeal at para. [42] of the grounds of judgment, had applied the correct test in *Kamarulzaman*. At paras. [43] to [47], the Court of Appeal found UOB was a subsequent purchaser as follows:

> 43. The learned Judge, with respect, should have adhered to the advice of His Lordship in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*. (*supra*) and asked the question whether UOB was a subsequent purchaser. This question, in our view is an issue of fact. The salient facts which were not considered by the learned Judge were these:
>
> (a) UOB had derived interest as chargee of the land from Heveaplast;
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> (b) The financing of the property involved a two-stage transaction in the following manner:
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> (i) The lodgement of the memorandum of transfer from the See brothers to Heveaplast; and
>
> (ii) Then the lodgment of UOB's charge.

[44] Though the above dealings were on the same day and were done simultaneously on 22 April 2009, it cannot be disputed nor can we ignore the fact that the lodgement of the UBO's Charge could not have been created until the first step of transfer to Heveaplast had been affected. And since there was no suggestion that UOB was tainted by fraud or forgery, UOB was what you call a purchaser for good consideration and without notice. Hence for the aforesaid reason we find that UOB is a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under section 340 of the NLC.

[31] We are of the view that although Heveaplast's interest, as immediate purchaser, is defeasible by the action taken by the See brothers, this fact is irrelevant as far as the case of UOB is concerned. The Court of Appeal at paras. [45], [46], and [47] of the grounds of judgment had rightly held based on two Federal Court decisions as follows:

45. Further we say that the fact that Heveaplast's interest being an immediate purchaser was defeasible by the See brothers did not, in our view, affect the indefeasibility of UOB's interest. Our view is supported by two decisions of the apex Court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors (supra)* and *Tan Ying Hong v. Tan Sian San & Ors* (*supra*).

46. In *Kamarulzaman Omar*, the Federal Court opined as follows:

... Thus, so long as a defeasible title or interest remains on the register and has not been set aside, it is capable of subsequent dealings by its holder. And, indeed, it can be a root of good title in favour of any subsequent purchaser in good faith and for valuable consideration.

47. In *Tan Ying Hong*, the then Chief Judge of Malaya (now the Chief Justice of the Federal Court) had remarked that the Court of Appeal decision in *OCBC Bank (Malaysia) Berhad v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949 was wrongly decided. The factual matrix in the *OCBC* case was similar to the present case, hence making those remarks, to say the least, instructive if not binding on this Court. This is what His Lordship said:

[24] ... This was followed by another panel of Court of Appeal in *OCBC Bank (Malaysia) Berhad v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949. In the latter case the appellant bank granted an overdraft facility to one Ng See Chow ("the borrower") which was secured by a charge registered in favour of the appellant over some lands in Johore. The borrower defaulted in the overdraft facility and the appellant commenced foreclosure proceedings and obtained an order for sale on 12 May 1992. On 15 September 1992, at the request of the police, the respondent entered a registrar's caveat on the land on the basis of police investigations into the report of one Ng Kim Hwa who claimed that the land belonged to him and that he had never executed any

transfer in favour of the borrower. Nevertheless, this first caveat was removed on 3 February 1993 with the consent of the respondent. Ng Kim Hwa thereafter brought an action against the borrower to recover the land and intervened in the appellant's foreclosure proceedings to set aside the order for sale or to stay the execution of the same pending the outcome of his civil suit against the borrower. The appellant contended that the charge on the land was indefeasible pursuant to s. 340 of the NLC as the appellant had obtained the same in good faith for valuable consideration.

[26] NH Chan, JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s. 340(3) of the NLC applies exclusively to those situations which are covered by sub-s. (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the owner since the title was obtained by forgery. On the facts of that case we agree that the title of Ng See Chow is defeasible under s. 340(2) of the NLC as he obtained his title through a forged instrument. However we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the proviso to s. 340(3) of the NLC. For that reason, we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

[32] We find also that the Court of Appeal's decision is also consistent with the Federal Court's decisions in *Low Huat Cheng* and *Lechumanan Chettiar*.

[33] In *Low Huat Cheng*, the third and fourth defendants, who were immediate purchasers, acquired title by way of a forged power of attorney. The third and fourth defendants sold the land to the fifth defendant, a *bona fide* subsequent purchaser. Azahar Mohamed FCJ, at para. [47] of the judgment said:

However, by the time the plaintiff as the original registered proprietor commenced the present action on 9 August 2012, *the defeasible title of the third and fourth defendants as bona fide immediate purchasers had become indefeasible when it was subsequently passed to the fifth defendant, a bona fide subsequent purchaser* (emphasis added). It therefore follows that the High Court and the Court of Appeal had gone too far to declare that the transfer of the property from the original owners (that is to say the parents of the plaintiff) to the third and fourth defendants was void. Unlike in the case of *Tan Ying Hong v. Tan Sian San & Ors*., the issue of setting aside the third and fourth defendants' title to the said property did not arise as the property had been sold to the fifth defendant, who was *bona fide* purchaser without notice; a retransfer of the property to the plaintiff's name was therefore not possible in the circumstances. The plaintiff's right of recovery of the property, to borrow the words of David SY Wong, 'is gone beyond recall'.

Azahar Mohamed FCJ's judgment was recently cited and followed by the Federal Court in *Lectchumanan Chettiar Alagappan*.

[34] In the circumstances of the case, it is our judgment that the Court of Appeal had arrived at a correct decision based on the facts and on the law.

[35] We now turn to the four questions of law posed before us as to whether these questions if answered would lean in favour of the See brothers.

[36] We agree with the submission of learned counsel for UOB that question 1 is vague. It does not identify what is "transaction in question". Question 1 also does not specify which is the "provision of s. 340 of the NLC" that would be invoked.

[37] As regards question 2, it is also vague and unclear. Question 2 is premised on a "non-existent forged title". It is not clear which title question 2 refers to which title in this case. Question 2 seems to contend a chargee's interest created based on a "non-existent forged title" enjoys immediate indefeasibility. The contention is incorrect.

[38] Question 3 is again unclear as to what "acquirer" and "interest registered" mean. Question 3 also presupposes the existence of a "non-existent forged title". It is noted that in this case neither the High Court nor the Court of Appeal made such a finding. Question 3 presupposes the chargee was a "conduit for the purchase". There was however no finding of fact by the High Court or Court of Appeal that UOB was a conduit for the purchase between Heveaplast and the See brothers.

[39] As regards question 4, we find that it is clearly not related to the facts. The land was transferred to Heveaplast. Heveaplast then created the UOB charges over the land. Question 4 seeks to examine whether "a person who has not acquired any title or interest a result of the non-existent forged title" can "convey or pass any title or interest to another". Question 4 to us is erroneous. The UOB charges, executed by Heveaplast in favour of UOB did not "convey or pass" any title or interest. A charge created under the NLC is different from a common law mortgage. (See the case of *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345; [2006] 5 MLJ 21.)

Conclusion

[40] For the reasons above-stated, we find no merit in the appeal by the See brothers. We do not find it necessary to answer the four questions posed. The appeal is therefore dismissed with costs.

We shall now deal with the second appeal by UOB under suit 216.

A **Decision Of The High Court**

[41] In suit 216, the High Court found:

(a) In relation to Heveaplast, the second SPA was "automatically terminated" due to Heveaplast's inability to transfer the land to Kum
B Hai. Heveaplast was therefore obliged to return the redemption sum.

(b) In relation to UOB, the UOB undertaking and the second SPA "were interlinked to each other". As such, UOB as Heveaplast's agent "has an implied contract with" Kum Hai. UOB was obliged to refund the redemption sum since the land had been returned to the See brothers and
C the UOB charges had been set aside.

[42] The High Court allowed Kum Hoi's claim and ordered:

(a) Heveaplast and/or UOB to repay the redemption sum;

(b) Heveaplast and/or UOB to pay interest at 5% p.a. on the redemption
D sum; and

(c) Heveaplast and/or UOB to pay the monthly interest paid by Kum Hoi to PBB on the redemption sum calculated on the PBB's prevailing BLR less 1.85% p.a. on daily rest starting from the date of disbursement to full settlement.
E

UOB appealed against the decision of the High Court to the Court of Appeal.

Decision Of The Court Of Appeal

[43] The Court of Appeal dismissed UOB's appeal but affirmed the
F decision of the High Court on different grounds. In dismissing the appeal, the Court of Appeal held:

(a) The court was "duty-bound to infer an implied term" to the UOB undertaking based on the principles laid down in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151,
G FC. The Court of Appeal held that it was an implied term that the UOB undertaking would not come into effect until Heveaplast was able to transfer the land to Kum Hoi.

(b) The Court of Appeal also dismissed UOB's argument that Kum Hoi was not privy to the UOB undertaking and hence not the proper party to sue.
H The Court of Appeal held that the UOB undertaking must be read as part of all agreements that form part of the same transaction based on the principle in *Manks v. Whiteley* (1912) CA 785, which was applied in *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230; [2000] 2 MLJ 267, and *Damansara Realty Bhd v.*
I *Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 and hence PBB was "nothing but a conduit for the payment of redemption sum by Kum Hoi to UOB".

Questions Of Law

[44] This court granted leave to appeal against the Court of Appeal's decision based on the following questions of law:

Question (1)

Whether the Court of Appeal when hearing an appeal is under s. 69 of the Courts of Judicature Act 1964 duty-bound to infer the existence of an implied term in a contractual dispute when the issue was neither pleaded nor raised in the High Court?

Question (2)

If question (1) above is answered in the affirmative, then under what circumstances is the Court of Appeal duty-bound to make the said inference?

Question (3)

Does the principle in *Manks v. Whiteley*, as applied in *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam*, and *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* overcome privity of contract and thereby entitling a third party financee to enforce an undertaking given by a chargee bank to a third party financier to refund the redemption sum if the charge cannot be discharged?

Question (4)

If question (3) is answered in the affirmative, then what are the remedies that third party financee is entitled to seek against the chargee bank when the chargee bank fails to honour the undertaking?

Submission Of UOB (The Appellant)

[45] Learned counsel for UOB submitted that the appeal should be allowed because the Court of Appeal is not duty-bound to infer an implied term to the UOB undertaking when this issue was neither pleaded nor raised at the High Court or argued at the Court of Appeal. It was also contended for UOB that the Court of Appeal also erred in applying the principles in *Manks v. Whiteley* and in finding UOB liable to pay the redemption sum together with interest.

[46] As regards question 1 posed in this appeal, learned counsel for UOB referred to us para. 2.2 of the UOB undertaking which provides as follows:

2. We refund to you the redemption sum paid to us, free of interest in the event:

2.2 ... the Discharge of Charge cannot be registered for any reasons attributable to us provided that the documents released by us are returned to us with our Debenture and/or Charge intact and

A provided further that the said documents are presented for registration within fourteen (14) days from the date of release of the said documents by us to you.

[47] It is the contention of UOB that under para. 2.2 of the UOB undertaking, UOB is only obliged to repay the redemption sum when all the B requirements have been satisfied. One of the requirements is that "the discharge of charge cannot be registered for any reasons attributable" to UOB. The High Court found that the UOB charges could not be discharged due to the Registrar's caveat. The Registrar's caveat was entered over the land due to the See brothers' application and not UOB.

C **[48]** Learned counsel for UOB submitted that even the Court of Appeal had made a finding that the fault here was not attributable to UOB but lay squarely on Heveaplast. Having found that UOB was not in breach of the UOB undertaking, the Court of Appeal however held that it was "duty bound" to infer an implied term to the UOB undertaking that it had no effect D until the land was transferred from Heveaplast to Kum Hoi.

[49] It is UOB's case that the Court of Appeal was wrong in coming to its decision that the UOB undertaking had no effect until the land was transferred from Heveaplast to Kum Hoi by inferring an implied term to the UOB undertaking. On this point, learned counsel for UOB highlighted the E provision of s. 69 of the Courts of Judicature Act 1964 ("CJA") as regards the powers of the Court of Appeal on the hearing of appeals as follows:

Hearing of appeals

69(1) Appeals to the Court of Appeal shall be by way of rehearing, and F in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

G (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and H not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

I (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

[50] It was submitted for UOB that s. 69 of the CJA does not impose a "duty" on the Court of Appeal to infer implied term in a contractual dispute when the issue was neither raised nor pleaded by parties. A party should ordinarily not be allowed to raise an issue that was neither pleaded nor raised in the High Court. (See the cases of *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141 and *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 3 CLJ 481; [2006] 5 MLJ 313).

[51] It was also submitted for UOB that notwithstanding that an appellate court has the discretion, in the interest of justice, to allow a new issue to be raised for the first time on appeal, the discretion is to be exercised sparingly and under limited circumstances.

[52] It was further submitted for UOB that when a new issue is raised for the first time on appeal, parties must be given an opportunity to deal with the new issue. Failure to do so amounts to a breach of natural justice. (See the case of *Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] 8 CLJ 293; [2016] 5 MLJ 590). In the present case, the issue of implied term was not argued by the parties at the Court of Appeal. Parties were also not invited to submit on the issue. Whether a term should be implied to a contract is a question of fact and parties should be allowed to bring evidence and submit on this issue.

[53] It is UOB's case that question (1) should be answered in the negative. As question (2) posed in this appeal is a consequential question arising from question (1), and given the answers in question (1) is in the negative, question (2) need not be answered.

[54] As regards question (3) posed in this appeal, learned counsel for UOB submitted that the Court of Appeal had erred in applying the principle in *Manks v. Whiteley* to overcome the doctrine of privity.

[55] Kum Hoi alleged that UOB breached its obligation under the UOB undertaking. However, UOB's defence was Kum Hoi was not privy to the UOB undertaking. The right party to sue was PBB. Kum Hoi denied it was not privy to the UOB undertaking. Kum Hoi claimed that UOB was obliged to refund the redemption sum because UOB was an agent or chargee to Heveaplast.

[56] The High Court held that the agency existed. In particular, the High Court held that the second defendant (UOB) as the first defendant's (Heveaplast) agent had an implied contract with the plaintiff. UOB challenged this finding on appeal because the relationship between UOB and Heveaplast under the letters of offer dated 8 April 2009 and 6 August 2009 was a simple banker and customer contractual relationship. Heveaplast did not appoint UOB as its agent under the letters of offer dated 8 April 2009 and 6 August 2009. There was also no such appointment under the UOB undertaking or the second SPA.

[57] The Court of Appeal affirmed the High Court's decision but on different grounds. The Court of Appeal was of the view that this was not a case of privity. Rather, it was a case where all agreements that form part of the same transaction should be read together following the principle in *Manks v. Whiteley*.

[58] Learned consent for UOB submitted that the Court of Appeal had erred in applying the principles in *Manks v. Whiteley* to overcome the doctrine of privity. It failed to consider that it is trite law only the parties to a contract are entitled to sue on the terms of the contract and to be liable for the obligation contained therein. (See the case of *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* (1915) AC 847).

[59] It is the contention of UOB that the principle in *Manks v. Whiteley* does not resolve the fact that there is an absence of consideration between UOB and Kum Hoi and consequently Kum Hoi cannot enforce the UOB undertaking. It has also been shown by case authorities that the doctrine of privity has been applied to preclude a third party from enforcing an undertaking where it is not privy. (See the case of *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; [2016] 2 MLJ 428).

[60] It was also submitted for UOB that the Court of Appeal's finding was not based on Kum Hoi's pleaded case. The issue was also not argued by the parties during the appeal.

[61] It is UOB's case that question (3) should be answered in the negative. Question (4) is a consequential question arising from the Court of Appeal's finding that it was an implied term of the UOB undertaking that it would not take effect until the land was transferred by Heveaplast to Kum Hoi. On that basis, Kum Hoi should only be entitled to claim for restitution against UOB.

[62] On the issue of whether UOB is to pay Kum Hoi the monthly interest on the redemption sum, the High Court ordered UOB to pay interest paid by Kum Hoi to PBB. Learned counsel for UOB submitted that the Court of Appeal affirmed the order for refund but said nothing about the order to pay interest. It is the contention of UOB that if this court holds that Kum Hoi is entitled to the redemption sum the claim can only be based on restitution. The order for damages against UOB is wrong in law and should be set aside.

Submission Of Kum Hoi (The First Respondent)

[63] It was submitted for Kum Hoi that if UOB were to succeed in resisting the refund of monies paid to it by Kum Hoi, then it will continue to have both a registered charge over the land and the redemption sum paid to it by Kum Hoi without any benefit whatsoever accruing to Kum Hoi. This would amount to UOB being unjustly enriched.

[64] It was also submitted for Kum Hoi that even if the discharge of UOB's charge is still possible, it would absolutely make no business sense for Kum Hoi to proceed with the discharge of UOB's charge on the land since the whole purpose of discharging UOB's charge is to have the land transferred to Kum Hoi and consequently to register PBB's charge on the land. This is now impossible since Heveaplast who charged the land to UOB has no ability to transfer the land to Kum Hoi. Even if the court were to find that UOB's charge on the said land is invalid, the redemption sum still has to be returned by UOB to Kum Hoi as there is no basis for the redemption sum to be paid to UOB in the first place.

[65] It is Kum Hoi's case that UOB's attempt to retain the redemption sum would certainly be against justice and equity. On this point, learned counsel for Kum Hoi referred to us the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 3 MLJ 331 wherein Gopal Sri Ram JCA (as he then was) stated:

> That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case.

[66] As regards questions 1 and 2 posed in this appeal, learned counsel for Kum Hoi submitted that the two questions were premised on a claim that the Court of Appeal overstepped its jurisdiction by inferring the existence of an implied term in a contractual dispute although such issue, that is, the existence of an implied term, was allegedly not pleaded. On this point, it was contended for Kum Hoi that the Court of Appeal had properly inferred an implied term into the letter of undertaking based on the officious bystander and the business efficacy tests. It was wrong for UOB to imply that the Court of Appeal decided on an unpleaded point and had somehow allegedly flouted s. 69 of the CJA. As long as sufficient facts or matters which give rise to the implied term have been pleaded, this would be sufficient for the purpose of pleadings. There is no requirement or necessity to plead the exact implied term which is a legal implication based on the pleaded facts and matters. It is trite law that legal results do not have to be pleaded.

[67] As regards questions 3 and 4 posed in this appeal, it was submitted for Kum Hoi that there was no suggestion in the Court of Appeal judgment that the *Manks v. Whiteley* principle overcomes the principle of privity of contract. Rather, the Court of Appeal after examining the documents that were contemporaneously executed made a finding on the peculiar or special facts of this case that if not for the sale and purchase agreement of the land between Heveaplast and Kum Hoi, the loan agreement would not have come into existence. The Court of Appeal reached the above conclusion after adopting the *Manks v. Whiteley* principle to read all contemporaneously executed documents together and therefore recognised Kum Hoi as a proper party.

[68] On the issue of the orders of both the High Court and Court of Appeal for UOB to pay Kum Hoi the monthly interest on the redemption sum, it is the contention of Kum Hoi that UOB had failed to dispute the monthly interest in its defence which Kum Hoi had prayed for in its statement of claim and as such, this clearly amounts to a non-pleaded issue.

[69] UOB also did not raise this issue of monthly interest on the redemption sum during the trial in the High Court. Similarly, in its appeal to the Court of Appeal, UOB did not raise the issue of interest in its memorandum of appeal. The Court of Appeal also did not make any ruling on this issue. It is entirely unreasonable to raise the issue on interest particularly at this stage of the proceedings taking into account the fact that UOB failed to plead this issue in its defence and had failed to dispute Kum Hoi's claim for the said interest. Learned counsel for Kum Hoi contended that in the circumstances of this case the Court of Appeal and the High Court were right in ordering UOB to pay Kum Hoi the monthly interest that Kum Hoi was paying to PBB on the redemption sum which was wrongfully withheld by UOB.

Decision Of This Court

[70] On the first and second questions posed in this appeal, we agree with the submission for Kum Hoi that the Court of Appeal did not refer to s. 69 of the CJA in inferring the existence of an implied term. The Court of Appeal also did not use s. 69 of the CJA as a legal basis in order to enable it to infer an implied term when hearing the appeal. We noted that what the Court of Appeal had stated was that it was duty-bound to infer the existence of an implied term into the letter of undertaking. In doing so, the Court of Appeal had merely construed and interpreted the letter of undertaking in a manner which does not offend common business sense.

[71] We are of the view that UOB's focus of the leave question on s. 69 of the CJA 1964 is erroneous. Although s. 69 of the CJA generally governs the powers of the Court of Appeal in hearing a civil appeal, there is no necessity or requirement for this court in the present case to examine or analyse s. 69 of the CJA given that this section was never an issue in the Court of Appeal.

[72] In any event, we take the view that s. 69 of the CJA gives the Court of Appeal unfettered powers on hearing of appeals. Under s. 69(1) of the CJA the Court of Appeal shall have all the powers and duties as to amendment or otherwise of the High Court, whilst under s. 69(4) of the CJA the Court of Appeal may draw inferences of fact, and give any judgment and make any order which ought to have been given or made and make such further or other orders as the case requires.

[73] UOB's leave question 1 is premised on a claim that the Court of Appeal overstepped its jurisdiction by inferring the existence of an implied term in a contractual dispute and the issue of an implied term was allegedly not pleaded by Kum Hoi. In this regard, it is necessary for us to examine the law on implied terms and the law on pleadings.

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The Law On Implied Terms

[74] The law on implied terms has been succinctly summarised in the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151 which was also extensively cited in the Court of Appeal judgment. The relevant paragraphs in *Sababumi*'s case at pp. 531-532 (CLJ); pp. 169-170 (MLJ) are reproduced as follows:

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> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
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> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.
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> The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, section 92(e) of the Evidence Act 1950 seems to be custom-made to prove logistical support for this particular type of implied term. It will be remembered that section 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.
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> Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, that is, that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries*
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(1926) Ltd (1993) 2 KB 206 at page 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".'

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* (1941) AC 108 at page 137, that in regard to an implied term, '... it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 years term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* (1918) 1 KB 592 at page 605 as '... of course, so and so will happen, we did not trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor.* (1977) AC 239 at page 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J. (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set out the evidence below in detail except to refer to such parts of it as and when necessary, as after all, this matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel and the courts below are apprised of detailed facts.

[75] Based on the evidence and applying the principles as stated in the above *Sababumi (Sandakan) Sdn Bhd*'s case, namely the officious bystander and the business efficacy tests, we find that the Court of Appeal in the present case had made correct findings on the issues raised as follows:

(i) an implied term had to be read into UOB's letter of undertaking to PBB dated 29 July 2009;

(ii) the implied term is that there was a condition precedent in the letter of undertaking before it could come into effect;

(iii) the condition precedent is that Heveaplast must have the ability to transfer the land to Kum Hoi;

(iv) such implied term gives business efficacy for the simple reason that all the loans extended by any financial institution must be premised solely on the ground that the borrower has good title to the land which would give good security to the financial institution; and

(v) in the present case, there is a complete lack of consideration in that Heveaplast cannot physically effect any sort of transfer of the land to Kum Hoi. To sustain the learned UOB's counsel's submission in such circumstances would defy any sense of reasonableness to a commercial contract.

[76] We are of the view that the Court of Appeal had properly inferred an implied term into the letter of undertaking based on the officious bystander and the business efficacy tests. We find no basis whatsoever for UOB to imply that the Court of Appeal decided on an unpleaded point and had somehow allegedly flouted s. 69 of the CJA.

[77] It is trite law that in general, a party is bound by its pleadings. All the facts from which the Court of Appeal inferred the implied term into the letter of undertaking had been sufficiently pleaded. There is no requirement or necessity to plead the exact implied term which is a legal implication based on the pleaded facts and matters. (See the case of *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464).

[78] In Kum Hoi's amended statement of claim, the following material facts were pleaded:

(i) that Kum Hoi and Heveaplast had entered into an SPA dated 12 February 2009 in respect of the land;

(ii) that Kum Hoi had applied for a loan facility from PBB for the purchase of the land;

(iii) upon Kum Hoi's request, PBB had offered Kum Hoi a loan facility for the sum of RM7,116,000;

(iv) as security for the loan facility, Kum Hoi and PBB entered into a facility agreement and executed the charge Form 16A;

(v) as the land had been previously charged to UOB, PBB requested UOB to forward a redemption statement and a letter of undertaking to PBB in order to enable PBB to release the redemption sum to UOB on behalf of Kum Hoi";

(iv) pursuant to the above, UOB had through a letter dated 29 July 2009 issued a redemption statement and a letter of undertaking stating as follows:

(a) that UOB would forward to PBB the original issue document of title to PBB upon receipt of the redemption sum in full by UOB; and

(b) UOB would refund the redemption sum in full to PBB in the event the discharge of charge cannot be registered for reasons attributable to UOB;

(vii) Heveaplast had also given a letter of undertaking dated 19 June 2009 to PBB which states that Heveaplast undertakes to refund/pay back the redemption sum in the event the transfer in favour of Kum Hoi cannot be registered for any reason whatsoever;

(viii) pursuant to the two letters of undertaking, PBB had on behalf of Kum Hoi released the redemption sum amounting to RM3,255,211.58 to UOB as the chargee bank on behalf of Heveaplast;

(ix) following this payment to UOB, PBB attempted to register a charge on the land on or around 15 September 2009; however it was unable to register the charge on the land and Kum Hoi was unable to effect the transfer of the land (to itself) due to the existence of a Registrar's caveat that had been entered on the land; and

(x) Kum Hoi found out about the existence of the Registrar's caveat after a search done at the land office showed that the Registrar's caveat was entered on 14 September 2009 because there were third parties who were claiming title on the land and challenging Heveaplast's title on the land.

[79] We are of the view that the above-pleaded facts were sufficient to give rise to an implied term as concluded by the Court of Appeal, namely that UOB's letter of undertaking to PBB dated 29 July 2009 only comes into effect if Heveaplast has ability to transfer the land to Kum Hoi. As pointed out by the Court of Appeal, this is because "it goes without saying" that the obligation of PBB to lend is conditional on Heveaplast's ability to transfer the land. In other words, PBB would only be able to become a chargee of the land if Heveaplast has the ability to transfer the land to Kum Hoi. As the ability of Heveaplast to transfer the land was not satisfied, the Court of Appeal rightly found that the letter of undertaking did not come into effect in that UOB could not rely on the words "for any reasons attributable to us" in the letter of undertaking to avoid returning the redemption sum to PBB.

[80] We would like to state here in respect of implied terms, several other authorities can be highlighted to show that it is the law which raises the implication from the presumed intention of the parties. In other words, it is a legal implication or a legal result or a question of law. In the case of *The Moorcock* (1889) 14 PD 64, Bowen LJ held as follows:

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. *The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.* In business transactions such as this, what **the law desires to effect by the implication** is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances. (emphasis added)

[81] *The Moorcock* was also affirmed by the Privy Council in *BP Refinery (Westernport) Pty Ltd v. President, Councillors And Ratepayers of the Shire of Hastings* (1977) 16 ALR 363 where Lord Simon of Glaisdale said:

> *Their Lordships venture to cite only three passages - albeit they are familiar to every student of this branch of the law. In The Moorcock (1889) 14 PD 64 at 68; (1886) All ER Rep 530 at 534, Bowen LJ said: 'I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the Jaw is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.* In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen …' it is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a part that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself. (emphasis added)

[82] *The Moorcock* was also cited by the UK Court of Appeal in the case of *In re An Arbitration Between Comptoir Commercial Anversois and Power, Son And Company* (1920) 1 KB 868 in which the Court of Appeal had further held as follows:

> They also added to the first of the above findings a statement that it was an implied term and/or condition of the contracts in question that the sellers should at all material times be able to sell or negotiate the

A exchange. *This last statement is, in my opinion, an inference of law as to the proper legal result of the facts as found, and is, therefore, open to review, and the learned judge has expressed a view to the contrary effect. The question whether such inference could properly be drawn is the very question left to the court, and now to be decided by us. That the question whether the contract is subject to an implied term or condition putting an end to it in certain events, or providing that in certain events it shall have* B *no operation, is a question of law is, I think clear. The question is what is the legal effect of the existence of certain facts; just as it is for the court to determine whether communications, written or verbal, constitute in law an express contract, so, in my opinion, it is with the question whether certain facts require the addition to a written contract of an implied term or condition. I think the authorities on the subject recognise this in that we find various tests suggested by reference to which judges are to* C *determine whether such an implied term or condition exists or not.*

(emphasis added)

[83] It is to be noted in the present case, the substance of the implied term concerns Heveaplast's ability to transfer the land to Kum Hoi. The facts D regarding Heveaplast being unable to transfer the land to Kum Hoi, which must result in the redemption sum being returned to Kum Hoi was in fact pleaded and raised during the trial. As such, we agree with the contention of Kum Hoi that UOB cannot claim that it was taken by surprise by the approach of the Court of Appeal in inferring the implied term in the letter E of undertaking regarding Heveaplast's ability to transfer the land.

[84] We shall now deal with questions 3 and 4 posed in this appeal by UOB. It is our finding that the principle in *Manks v. Whiteley* and its application to the present case was adequately considered by the Court of Appeal as set out in paras. 55 to 58 of its judgment.

F **[85]** The Court of Appeal relied on a previous decision of the Court of Appeal in *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230; [2000] 2 MLJ 267, CA where the *Manks v. Whiteley* principle was stated as follows:

G Where several deeds form part of one transaction and are contemporaneously executed, they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as H a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of *things, which in such a case is the whole transaction, and not with unrealities such as the* I *hypothetical operation of one of the deeds by itself without the others.* (emphasis added)

[86] The Court of Appeal also relied on the Federal Court decision in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd (supra)* which stated the following:

> [18] In any event, we do not think it is in dispute in that the general rule is that where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties. (See *Manks v. Whiteley* (1912) 1 ch 735; (1914) AC 132 and *Mohamed Isa v. Abdul Karim*; (1970) 2 MLJ 165).

[87] We do not find any suggestion in the Court of Appeal judgment that the *Manks v. Whiteley* principle overcomes the principle of privity of contract. The Court of Appeal had in fact after examining the documents that were contemporaneously executed made a finding on the peculiar or special facts of this case that if not for the sale and purchase agreement of the land between Heveaplast and Kum Hoi, the loan agreement would not have come into existence.

[88] We agree with the finding of the Court of Appeal that the redemption money was released by Public Bank Bhd to UOB and that the money paid originated from the loan account of Kum Hoi. Hence Public Bank Bhd was nothing but a conduit for the payment of the redemption amount by Kum Hoi. The Court of Appeal had rightly reached the conclusion after adopting the *Manks and Whiteley* principle and reading it with all contemporaneously executed documents together and thus recognising Kum Hoi as a proper party to sue UOB.

[89] On the issue of payment of monthly interest on the redemption sum, we noted that both the High Court and the Court of Appeal had ordered UOB to pay Kum Hoi the monthly interest that Kum Hoi was paying to PBB on the redemption sum which was wrongfully withheld by UOB. UOB took the view that the monthly interest should not be imposed on the redemption sum. On this point, we noted that UOB had failed to dispute the monthly interest in its defence which Kum Hoi had prayed for in its statement of claim and as such, this clearly amounts to a non-pleaded issue.

[90] Since the monthly interest claim is an undisputed issue which was not tried in the High Court, the High Court therefore did not make any ruling on this particular issue. We are of the view that the fact that UOB failed to dispute the monthly interest claimed by Kum Hoi clearly shows that UOB should not raise this issue at this stage of the proceedings.

[91] Similarly, in its appeal to the Court of Appeal, UOB did not raise the issue of interest in its memorandum of appeal. The Court of Appeal also did not make any ruling on this issue. Therefore, it is entirely unreasonable to raise the issue on interest particularly at this stage of the proceedings taking into account the fact that UOB had failed to plead this issue in its defence and had failed to dispute Kum Hoi's claim for the said interest.

[92] In the circumstances, it is our judgment that the Court of Appeal and the High Court were clearly right in ordering UOB to pay Kum Hoi the monthly interest that Kum Hoi was paying to PBB on the redemption sum which was wrongfully withheld by UOB.

[93] On this issue of payment of monthly interest on the redemption sum, it is pertinent to note that Kum Hoi had in fact prayed for further and other reliefs which the court deems fit and just. The prayer in our view is sufficient for both the High Court and the Court of Appeal to exercise its equitable jurisdiction to order UOB to pay Kum Hoi the monthly interest that Kum Hoi was paying to PBB on the redemption sum which was wrongfully withheld by UOB. (See the case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679; [2005] 2 MLJ 42).

Conclusion

[94] For the reasons above-stated, we find there is no merit in UOB's appeal. We also find that there is no necessity to answer the four questions posed before us as the answers to the same would be abstract and hypothetical given that they will not make any difference to UOB's appeal. The appeal is therefore dismissed with costs.